BURHAN ATING & ORS.

v.

DIRECTORS OF LANDS & SURVEYS & ORS.

HIGH COURT BORNEO
IAN HC CHIN JC
[ORIGINATING SUMMONS NO. T. 24 OF 1991]
23 MARCH 1992

CIVIL PROCEDURE: *The law on striking out - Whether claim unsustainable - Whether relief sought can be granted by the Court - Whether jurisdiction of the Court had been excluded by statute - Whether matter is for jurisdiction by another tribunal - Whether claim for declaration - Disguised as mandatory injunction - Whether action within ambit of the provisions of the Court - Land Ordinance (Sabah Cap. 68), Land Rules (G.N. 505 of 1930) s. 29 of the Government Proceedings Ordinance 1956, s. 54 of Specific Relief Act 1950 and O. 53 Rules of High Court.*

The plaintiffs in the present case sought either (a) for a declaration that the plaintiffs are the successful applicants of 6,700 acres of land and or (b) for a declaration that the said land be given to the plaintiffs. The said application was made *vide* originating summons.

The issue relied on by the plaintiffs were two letters purported to be material communication in support of the plaintiffs' two prayers made in the originating summons and the authorities behind the communication of the said letter were Jabatan Ketua Menteri and Pemungut Hasil Tanah (Jabatan Tanah dan Ukur) Tawau that is the second and first defendant's - respectively.

The first and second defendant *vide* SIC taken out at the Court - applied to strike out the plaintiff's originating summons under O. 18 r. 19 of RHC 1980 under the inherent jurisdiction of the Court.

Held:

[1] The Court is aware that it is only in plain and obvious cases or in cases where the claim on the face of it is obviously unsustainable that the Court will exercise its power to strike out an action.

[2] If an action is brought solely to obtain relief which the Court cannot grant it will be struck out. The Court will also strike out an action where the Court's jurisdiction has been excluded by statute.

[3] A declaration will also be refused if the matter is placed under the exclusive jurisdiction of another tribunal.

[4] The said claim (a) is also plainly and obviously unsustainable in view of the various provisions of the Land Ordinance (Sabah Cap. 68), the Land Rules (G.N. 505 of 1930) s. 29 of the Government Proceedings Ordinance 1956 and s. 54 of the Specific Relief Act 1950.

[5] This claim (b) presupposes that the plaintiffs have established their right to a title to the said land. If the Court is to grant the declaration in claim (b) the Court would be taking over the jurisdiction of the Director of Lands & Surveys and of the collection which the Land Ordinance had conferred on them. This the Court cannot and must not do in view of the prohibition of s. 41(2) of the Land Ordinance and the Court can only come in where the matter is properly on appeal before the Court. This claim is therefore plainly and obviously unsustainable.

[6] These two claims are also unsustainable for the reason that the two orders sought (c) and (d) which are in fact mandatory injunctions, are prohibited by s. 29 of the Government Proceedings Ordinance 1956 and by s. 54 of the Specific Relief Act 1950.

Cases referred to:
Re Application by Dow Jones (Asia) Inc. [1988] 1 MLJ 222 ***(cons)***
Majunder v. Attorney-General of Sarawak [1965] 1 MLJ 41 ***(foll)***

Legislation referred to:
Government Proceedings Ordinance 1956, s. 29
Land Ordinance (Cap 68) (Sabah), ss. 6, 9, 14, 15, 16, 41(1), (2), 65, 88, 89
Land Rules 1930 (Sabah), r. 2
Rules of the High Court 1980, O. 18 r. 19, O. 53
Specific Relief Act 1950, s. 54

Other source referred to:
The White Book 1985, pp. 220, 305, 307

For the plaintiffs - Basalie Hj. Ad. Hamid, Esq
For the 1st and 2nd defendants - Mohd. Salleh Lamsin, Esq

JUDGMENT

Ian HC Chin JC:

The Plaintiffs' Case

Burhan Bin Ating and 416 ors. (hereinafter called the plaintiffs) on 10 August 1991 commenced an action by way of an originating summons against the Director of Lands and Surveys (hereinafter called the 1st defendant), the Government of the State of Sabah (hereinafter called the 2nd defendant) and Merotai Estates Sdn. Bhd. (hereinafter called the 3rd defendant). The plaintiffs by their originating summons claim against the 1st and 2nd defendants (reproduced faithfully):

(a) A declaration that a piece of land held under MNR 133/2679/78 of 6,700 acres state land and situated at Kawasan LKTNS, District of Tawau applied for by the plaintiffs in October 1989 and also under reference No CMB 515/29/1 PT.K/416 as the successful called the concession) be given to the plaintiffs.

(b) A declaration that the purported cancellation of the plaintiffs application and transfer of the concession to other parties is void *ab initio* and illegal.

(c) An order ordering the Director of Lands and Surveys to cancel the granting of the concession to others.

(d) An order that the Setiausaha Hasil Bumi do direct the Directors of Lands and Surveys to do all things necessary for vesting it to the plaintiffs as they shall direct.

Summary of Plaintiffs' Contentions

One of the plaintiffs, Burhan Bin Ating, on 10 August 1991, 25 February 1992, 2 & 13 March 1992 affirmed four affidavits in support of the originating summons, the gist of which allegations, which are gleaned from the said affidavits, can be summarized as follows:

(1) that the letter dated 2 March 1990 from the Setiausaha Hasil Bumi to the Pengarah Tanah dan Ukur and the letter dated 25 March 1991 from the Assistant Collector of Land Revenue indicate the approval for the plaintiffs of 6,700 acres of land at the Tanah Simpanan Penempatan Merotai Besar, Tawau;

(2) that the plaintiffs have been residing on the said land for 20 years;

(3) that the plaintiff Burhan Bin Ating and three other plaintiffs on 2 April 1991 paid RM50 each to the Lands & Surveys Department, Tawau, to register their land applications (see affidavit of 13 March 1992 and exhibits);

(4) that the 1st defendant subsequently canceled the plaintiffs application and granted the said area to the 3rd defendant; and

(5) that the 1st and 2nd defendants were notified of the plaintiffs' disagreement to the cancellation of plaintiffs' application for the said land;

The plaintiffs contend that:

(1) that the letter dated 2 March 1990 from the Setiausaha Hasil Bumi to the Pengarah Tanah dan Ukur and the letter dated 25 March 1991 from the Assistant Collector of Land Revenue to the plaintiff Burhan Bin Ating can be construed to mean an approval of 6,700 acres of land for the plaintiffs (both letters are reproduced in full below);

(2) that the plaintiffs by the fact of their occupation of the land in question for more than 20 years have established native customary rights to the land; and

(3) that the 1st and 2nd defendants have cancelled the plaintiffs' land applications and which cancellation is void *ab initio* and illegal.

The said two letters, in Bahasa Malaysia, are reproduced here in full:

***

Telegram: CHIEFMIN KOTA KINABALU

Jabatan Bil. MNR. 133/2679/78
Ketua Menteri
(Chief Minister's Department)
Kota Kinabalu
Sabah, Malaysia

2 Mac 1990

Pengarah Tanah dan Ukur,

Kota Kinabalu.

Tanah Simpanan Penempatan Merotai

Besar, Tawau seluas 6,700 ekar

Saya diarah merujuk kepada perkara yang tersebut di atas dan sila maklum bahawa keputusan terhadap perkara ini adalah seperti berikut:

1. tanah yang diduduki dan dimajukan sepenuhnya dikeluarkan daripada kawasan seluas 6,700 ekar, kawasan tersebut adalah seperti berikut:

1.1 58 hektar seperti yang ditunjukkan dalam peta bertanda Al warna ungu. Kawasan ini diduduki oleh 27 orang, senarai nama dan butir-butir lanjut disertakan sebagai Lampiran A;

1.2 122 hektar seperti yang ditunjukkan dalam peta bertanda A2 warna biru. Kawasan ini diduduki oleh 17 orang, senarai nama dan butir-butir lanjut disertakan sebagai Lampiran B;

1.3 37 hektar seperti yang ditunjukkan dalam peta bertanda B berwarna orange. Kawasan ini dididuduki oleh 4 orang, senarai nama dan butir-butir lanjut disertakan sebagai Lampiran C;

2. tanah seluas lebih kurang 217 hektar yang dipersetujui dikeluarkan akan dipertimbangkan untuk kelulusan kepada senarai nama peserta dalam Lampiran A, B dan C dengan syarat-syarat seperti berikut:

2.1 dikenakan syarat-syarat untuk skim pekebun kecil;

2.2 pemohon adalah warganegara Malaysia berasal daripada Sabah atau yang menpunyai status "permanent stay" di Sabah;

2.3 permohonan tanah diproses mengikut cara yang ditetapkan;

3. permohonan-permohonan lain tidak dibenarkan.

4. Mesyuarat yang diadakan pada 12 Februari 1990 dengan Lembaga Kemajuan Tanah Negeri Sabah dan Pengarah

Tanah dan Ukur dirujuk.

Sekian, harap maklum.

"Berhidmat Untuk Negra Dengan Bersih, Cekap Dan Amanah"

(William Shim)
Setiausaha Hasil Bumi

Pengurus Besar,
Lembaga Kemajuan Tanah Negeri Sabah,
Kota Kinabalu.

Penolong Pemungut Hasil Tanah,
Tawau.

Juru Ukur Daerah,
Tawau.

MNR. 133/513.

***

Jabatan Tanah Dan Ukur

Bil Kami LST. 6000/264/148 25 Mac 1991

Encik Burhan B Ating dan peserta,
Peti Surat Bil 391,
91007 Tawau

Permohonan Tanah Di Kawasan
Simpanan Penempatan Merotai Besar,
Tawau

Adalah dengan sukacitanya saya telah diarah memaklumkan bahawa sebahagian daripada pengikut-pengikut Encik telah dipertimbangkan untuk kelulusan oleh Setiausaha Hasil Bumi, Kota Kinabalu melalui MNR. 133/2679/78 bertarikh 2 Mac 1990.

Sila arahkan pemohon-pemohon yang ada membangunkan kawasan bertanda merah dalam peta disertakan bersama ini supaya mengemukakan borang tanah ke Pejabat Tanah, Tawau untuk didaftarkan dan diproses.

Sekian.

"Berhidmkat Untuk Negara Dengan Bersih Cekap Dan Amanah"

Signed
(Hiew Ha Min)
Penolong Pemungut Hasil Tanah,
Tawau.

***

The Striking Out Application

The 1st and 2nd defendant on 19 October 1991 entered their appearance and on 4 December 1991 took out the present summons-in-chambers to strike out the plaintiffs' originating summons under the provsions of O. 18 r. 19 of the Rules of the High Court and under the inherent jurisdiction of the Court. Two affidavits were affirmed on 29 November 1991 and on 17 February 1992 on behalf of the 1st and 2nd defendant in support of the application to strike out the action against them. It is not proposed to deal with the said two affidavits as they contain only contentions and submissions and where they contain belief and information, the ground of the belief or the source of the information were not disclosed. They are not what affidavits are supposed to be. See *In Re Application by Dow Jones (Asia) Inc.* [1988] 1 MLJ 222 at p. 225-226. Arguments were heard on 13 March 1992 and the Court adjourned the hearing to today.

The Law on Striking Out

The Court is aware that it is only in plain and obvious cases or in cases where the claim on the face of it is obviously unsustainable that the Court will exercise its power to strike out an action.

If an action is brought solely to obtain relief which the Court cannot grant it will be struck out. The Court will also strike out an action where the Court's jurisdiction has been excluded by statute. See the White Book 1985 at p. 305, 307 and 220. A declaration will also be refused if the matter is placed under the exclusive jurisdiction of another tribunal. See *Majunder v. Attorney-General of Sarawak* [1965] 1 MLJ 41, 48 and the White Book, 1985 at p. 220.

Conclusion

What remains to be done is an examination, one by one, of the claims of the plaintiffs, in so far as they concern the 1st and 2nd defendants, hereinbefore enumerated as (a) to (d), and of the laws relating thereto in order to determine whether the originating summons as against the 1st and 2nd defendants ought to be struck out.

Claim (a)

> (a) A declaration that a piece of land held under MNR 133/2679/78 of 6,700 acres state land and situated at Kawasan LKTNS, District of Tawau applied for by the plaintiffs in October 1989 and also under reference No CMB 515/29/1 PT.K/416 the successful applicants of the state area (hereinafter called the concession) be given to the plaintiffs.

The sentence is so badly constructed that in order to give it some meaning the Court will regard the sentence as praying either (1) for a declaration that the plaintiffs are the successful applicants of 6,700 acres of land and or (2) for a declaration that the said land be given to the plaintiffs.

The Court is of the opinion that this claim(a), whichever construction is given, is plainly and obviously unsustainable for the reasons appearing hereinafter.

The said letter of 2 March 1991 clearly and unequivocally speaks of considering the approval of 217 hectare of land for a total of 48 people and which land is to be excised from 6,700 acres of land. The letter also lays down a condition that the application for the said 217 hectare of land must be in accordance with the proper procedure. The said second letter of 25 March 1991 requested the plaintiff Burhan Bin Ating and his followers to submit the land application forms to the land office, Tawau for registration and processing. These two letters, cannot by any stretch of imagination be argued as indicating an approval of 6,700 acres of land for the plaintiffs. The contention of the plaintiffs that these letters amounts to an approval to them of 6,700 acres of land is obviously unsustainable.

The said claim (a) is also plainly and obviously unsustainable in view of the various provisions of the Land Ordinance (Sabah Cap. 68), the Land Rules (G.N. 505 of 1930), s. 29 of the Government Proceedings Ordinance, 1956 and s. 54 of the Specific Relief Act 1950, apart from the decided cases hereinabove referred to.

Anyone applying for state land must do so in writing and in the case of native land can do so orally and the application must be made to the Collector of Land Revenue who is empowered to refuse any application and may under certain circumstances cancel the application. Acceptance of the fees by the authority concerned for the application for land "shall not constitute any undertaking that the application will be approved". See r. 2 of the Land Rules (G.N. 505 of 1930). All claim to native customary rights, which rights are defined in ss. 15 and 65 of the Land Ordinance and which include lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years, are to be decided, as provided by s. 14 of the Land Ordinance by the Collector of Land Revenue. Even if the claim to native customary rights is established, the collector still has a discretion, under s. 16 of the Land Ordinance, whether to pay monetary compensation or to issue a title to the claimant.

Anyone dissatisfied with the decision or order of the Collector of Land Revenue can appeal to the Director of Lands & Surveys and from the decision or order of the Director of Lands & Surveys, to the High Court. See s. 41 of the Land Ordinance. The Court is not to exercise original jurisdiction as to any claim or question in respect of which jurisdiction is given by the Land Ordinance to a collector of Land Revenue or to the Director of Lands & Surveys. See s. 41 (2) of the Land Ordinance.

The Land Ordinance, s. 88, read with s. 89, provides that no claim to land shall be valid until the title to the land is registered in accordance with the provisions of Part V of the Land Ordinance. A discretion is conferred, by s. 9 of the Land Ordinance, on the Director of Lands Surveys whether or not to alienate lands to anyone and his decision is by s. 41(1) of the Land Ordinance not appealable.

It ought finally to be observed that under s. 6 of the Land Ordinance unlawful occupation of state land cannot establish any rights against the Government of the state of Sabah.

The Court cannot grant the declaration (a) because it is not only that its jurisdiction had been excluded by s. 41(2) of the Land Ordinance but because also the jurisdiction to grant such relief, which flows from the declaration, is given to the Collector of Land Revenue and to the Director of Lands & Surveys respectively under ss. 14 & 9 of the Land Ordinance. In so far as the claim (a) is based otherwise than on native customary rights, the claim (a) is doomed to failure right from the start as s. 6 of the Land Ordinance expressly provides that

unlawful occupation of state land cannot establish any right. If the claim (a) is for the said land to be transferred to the plaintiffs than the claim (a), which would then be a claim for a mandatory injunction disguised as a claim for a declaration, will also fail in view of the prohibition by s. 29 of the Government Proceedings Ordinance 1956 and s. 54 of the Specific Relief Act 1950 against the grant of such order, the present action of the plaintiffs not being an action under the provisions of O. 53 of the Rules of the High Court.

Claim (b)

(b) A declaration that the purported cancellation of the plaintiffs' application and transfer of the concession to other parties is void *ab initio* and illegal.

This claim (b) presupposes that the plaintiffs have established their right to a title to the said land. As pointed out earlier, the Director of Lands & Surveys has a discretion whether to alienate land to anyone and his decision cannot be appealed against. It has also been pointed out earlier that the Collector has been empowered to decide on claims for native customary rights and been empowered to decide whether to pay compensation or to issue title to the successful claimant of native customary rights and provisions exist for appeal against such decision of the Collector with the final appeal going to the High Court in Borneo. If the Court is to grant the declaration in claim (b) the Court would be taken over the jurisdiction of the Director of Lands & Surveys and of the Collector which the Land Ordinance had conferred on them. This the Court cannot and must not do in view of the prohibition of s. 41(2) of the Land Ordinance and the Court can only come in where the matter is properly, on appeal, before the Court. This claim (b) is therefore plainly and obviously unsustainable.

Claim (c) and (d)

(c) An order ordering the Director of Lands and Surveys to cancel the granting of the concession to others; and

(d) An order that the Setiausaha Hasil Bumi do direct the Directors of Lands and Surveys to do all things necessary for vesting it to the plaintiffs as they shall direct.

These two claims, (c) and (d), are also obviously unsustainable for the reasons given above which pertain, as well as for the reason that the two orders ((c) and (d)) sought, which are in fact mandatory injunctions, are prohibited by s. 29 of the Government Proceedings Ordinance 1956 and by s. 54 of the Specific Relief Act 1950.

I therefore order the originating summons against the 1st and 2nd defendants, for the reasons stated above, be struck out with costs to be taxed.

Also found at [1992] 2 CLJ 1203